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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1088

JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioners
Office & P. O. Address
186 Joralemon Street
Brooklyn, New York 11201
UL 5-1111

WILLIAM SONENSHINE
Member of the Bar of the Supreme Court of the United States
Of Counsel

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as follows:

A. Opinions Below

The United States Court of Appeals for the Second Circuit unanimously affirmed on March 25, 1965, an order of the United States District Court for the Eastern District of New York (Walter Bruchhausen, Judge) which order denied a motion for a new trial on the ground of newly

discovered evidence and to vacate a judgment of conviction and for further relief, in aid of said motion, for an order compelling the Government to produce certain medical records in its possession relating to the medical history of one Hector Mangual, a prosecution witness.

The opinion of the United States Court of Appeals for the Second Circuit (not yet officially reported) is set forth in its entirety in Appendix "A" hereto.

The opinion of the Honorable Walter Bruchhausen, Judge of the United States District Court for the Eastern District of New York (not yet officially reported) is set forth in Appendix "B" hereto.

There were no other opinions written in connection with the case.

B. The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, §1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1, of the Rules of this Court.

The Judgment and order sought to be reviewed herein is the judgment and order of the United States Court of Appeals for the Second Circuit entered on March 25, 1965, as aforesaid.

C. The Questions Presented for Review

1. Did the Courts below err in refusing to compel the Government to disclose the medical records of the aforesaid witness Hector Mangual in aid of the motion for a new trial where said records were in the exclusive custody and control of the United States Government.

D. Constitutional Provisions and Statutes Involved

1. The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The statute involved is Rule 33, Federal Rules of Criminal Procedure.

Each of the foregoing is set forth verbatim in Appendix "C" of this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were originally tried in the United States District Court, Eastern District of New York, for violation of U. S. Code, Section 111, under Indictment No. 63-CR-324 before the Honorable Walter Bruchhausen, a Judge of said Court and a jury. Following the jury's verdict of "guilty", each petitioner was sentenced on January 21, 1964 by Judge Bruchhausen to be committed to the custody of the Attorney General for a period of 24 months.

Upon appeal to the U. S. Court of Appeals for the Second Circuit, said judgment of conviction was affirmed on August 4, 1964 (335 F. 2d 414).

A petition for certiorari was denied by this Court on or about November 16, 1964 (379 U. S. 914).

Following the imposition of sentence as aforesaid, petitioners moved in the District Court for a new trial based upon statements made by one Hector J. Mangual, a Government witness at the trial, that he had falsely testified with respect to his identification of the petitioners.

Upon the hearing, the said Mangual repudiated his recantation of the trial testimony thus maintaining that his original trial testimony was the truth. He also asserted that the recantation was made as the result of coercion allegedly exerted by all of said petitioners with the exception of petitioner George Lombardozzi. The motion for a new trial was withdrawn.

As a result of these charges by Mangual, all of said petitioners with the exception of George Lombardozzi were indicted along with Frederick S. Abrams, Esq., the attorney who represented appellants Zampello and Marino upon the original trial. Said indictments charged them with a conspiracy to obstruct justice. Trial was held upon said indictments in the U. S. District Court for the Southern District of New York in July, 1964. On or about July 22, 1964, all defendants were acquitted by the jury.

Upon said second trial, there was delivered to petitioners' attorneys by the U. S. Attorney, a copy of a report dated March 19, 1964 by the Federal Bureau of Investigation, relating to the mental condition of said Manugual. Said report was marked for identification at the trial as Defendants' Exhibit B. A copy thereof is part of the record filed below, which record is filed with this petition.

Said report contains, among other things, the following statement by Captain J. M. Laudenslager, Clinical Psychologist, Medical Service Corps, Bureau of Naval Medicine and Surgery, U. S. Navy, with respect to the mental stability of said Mangual:

> "Upon information appearing in the file, he would consider Mangual mentally unstable • • • Mangual has a personality or character disorder of long standing

which was pre-existent of his entry into the Marine Corps. This condition is not subject to change and will continue throughout his lifetime if not properly treated. This condition causes the patient to manipulate situations in which he may be involved for personal gain. The above condition was the cause of Mangual having been discharged from the Marine Corps on April 1, 1955."

Said information with respect to Mangual's mental stability was not known to appellants at the time of their trial and conviction, nor could it have been reasonably discovered in the exercise of due diligence. Said information was not cumulative and if known to the trial court and jury at the time of said trial, would have altered the verdict so as to render same in favor of appellants.

The materiality of Mangual's mental instability arises from the fact that upon the trial he testified at great length, during the course of which testimony he identified all of the above appellants with the exception of George Lombardozzi as having participated in the assault which was the subject of the indictment then being tried.

In addition Mangual's mental instability was patently known to the U. S. Government through the records of the U. S. Marine Corps and the Bureau of Naval Medicine and Surgery. Thus, it was at least constructively within the knowledge of the U. S. Attorney's Office as an agency of the U. S. Government. As such, the U. S. Attorney was chargeable with knowledge thereof and the failure to make such information known at the time of said trial also amounts in law to a suppression of material evidence.

It was the primary position of petitioners that they could not proceed to establish their basis for a new trial without having access to all of the medical information which was in the exclusive possession of the Government, and that the Government should be compelled to produce said records in Court so that the Court could have before it all the pertinent information relative to the mental instability of the witness. The Court refused to grant such relief.

The Government urged that the medical records would not be material since at best it would go only to destroy the credibility of the witness. Such a result, the Government argued, would not be a sufficient basis to set aside the verdict.

The Government further submitted in opposition to the motion an affidavit of the aforementioned Captain Laudenslager in which he stated that contrary to the statement of Agent Sloan he did not advise Sloan that Mangual was *mentally* unstable, but, rather, he advised Sloan "that the available information suggested *emotional* instability."

F. Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the original judgment of conviction was had in said Court and that, accordingly, the motion for a new trial was necessarily within the jurisdiction of said Court.

G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

The Court below erred in denying to petitioners acc ss to the Government's records as to the mental stability of the witness.

As previously indicated petitioners sought, in aid of the motion for a new trial, to compel the Government to produce in Court its records as to the mental stability of the witness Mangual. That such records do in fact exist is admitted by the Government in the affidavit of Captain J. M. Laudenslager of the Bureau of Medicine and Surgery (18a-20a).

The instant motion for a new trial was based upon newly discovered evidence consisting of an F. B. I. Report indicating in no uncertain terms that one Hector Mangual (a witness by whose trial testimony four of the five appellants were identified as the perpetrators of the assault) was "mentally unstable". More specifically, the F. B. I. Report stated, in part (10a-11a):

> "Captain J. M. Laudenslager, Clinical Psychologist, Medical Service Corps, Bureau of Naval Medicine and Surgery, United States Navy, advised after reviewing the medical record of HECTOR J. MANGUAL, Marine Service No. 120 41 20, advised that based upon information appearing in the file he would consider MANGUAL *mentally unstable.* Captain Laudenslager advised examinations of MANGUAL at various times at various naval hospitals indicate MANGUAL has a personality or character disorder of long standing which was pre-

existent of his entry into the Marine Corps. *This condition is not subject to change and will continue throughout his lifetime if not properly treated. This condition causes the patient to manipulate situations in which he may be involved for personal gain.*"

* * * * *

"Captain Laudenslager concluded *he would be apprehensive of any statement or testimony* MANGUAL *made* in view of his medical record while in the United States Marine Corps. Dr. Laudenslager noted this opinion is based solely upon information in the record and does not take into consideration any treatment he may have had since discharge." (Italics supplied.)

It is readily apparent the Government had in its possession (although perhaps unknowingly at the time of trial) information establishing that Mangual was by reason of mental instability either totally incompetent to have testified at the trial or, at the very least, was deranged to the extent that the Court and jury should have been made aware of his condition in order to assess the quality of his alleged eyewitness identifications.

The mental condition of a witness is, of course, a vital factor in determining firstly, his competency to testify at all and, secondly, the probative value of such testimony if received. As stated by the United States Supreme Court in *District of Columbia* v. *Armes*, 107 U. S. 519, 521-522:

"It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his

condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution."

* * * * *

"The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity."

See, also *U. S.* v. *Hiss,* 88 F. Supp. 559 (S. D. N. Y. 1950).

It must be stressed here that the purpose of seeking the information in the Government's possession was not to offer it *carte blanche* upon the hearing. Obviously, the mere reports themselves would not be admissible. But disclosure of the names of the persons who had examined Mangual was essential in order to subpoena them upon the hearing to testify as to the nature of Mangual's "mental instability".

It should not be overlooked that *this information is in the sole and exclusive possession of the Government.* Without it, petitioners are for all practical purposes foreclosed from pursuing their statutory remedy to seek a new trial.

Petitioners were thus in the anomalous position below where if any relief from the judgment were in law and fact

available to them, they perforce had to seek it by calling upon their prosecutors to disclose it.

We therefore urge that it does not behoove the Government to place obstacles in the path of petitioners' quest for the facts which may afford them legitimate relief.

Underlying appellants' position herein are the simple principles of fairness so aptly phrased by Mr. Justice Douglas in *Brady* v. *Maryland*, 373 U. S. 83, 87-88 (1962):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile', to use the words of the Court of Appeals, 226 Md. at 427, 174 A. 2d, at 169."

CONCLUSION

The Petition for Certiorari should be granted.

Dated: Brooklyn, New York
April, 1965

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Appellants

WILLIAM SONENSHINE
Of Counsel